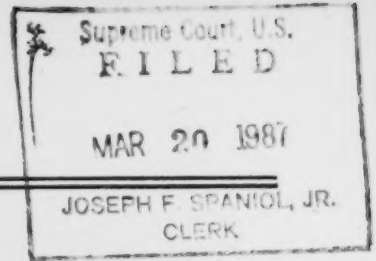


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**In the
Supreme Court of the United States**

October Term, 1986

Jackie Don Colclasure; June
Colclasure; Thelma Norine
Colclasure; Thelma Norine
Colclasure, Guardian of the
Estate of Ralph E. Colclasure;
and Jackie Don Colclasure, Trustee *Petitioners*

V.

Kansas City Life Insurance
Company and J. Marshall
Chatfield, Successor Trustee *Respondent*

**PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

PAUL JOHNSON
12521 Kanis Road
Little Rock, AR 72211
(501) 227-9292

Attorney for Petitioners

29 PM

QUESTION PRESENTED FOR REVIEW

I.

SHOULD A PARTY IN A STATE COURT ACTION HAVE A RIGHT TO TRIAL BY JURY AS GUARANTEED BY THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CASES WHERE THERE IS DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

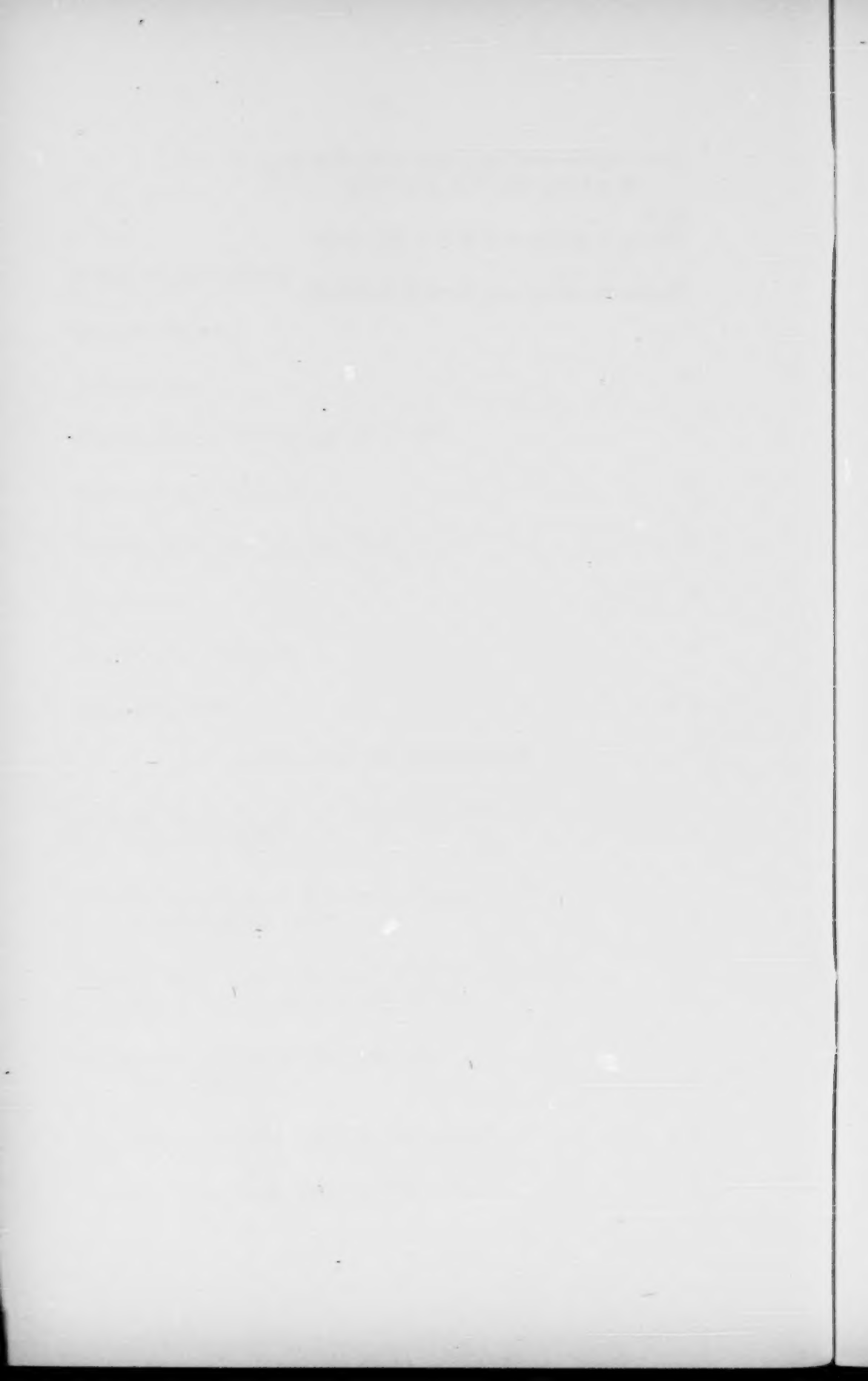
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PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The decision of the Arkansas Supreme Court was rendered on December 22, 1986.

JURISDICTION

The basis for this Court's jurisdiction to review the decision by Petition for Writ of Certiorari is conferred by Rule 17, Rules of the Supreme Court of the United States. The present Petition is presented within ninety days of the December 22, 1986, Arkansas Supreme Court decision and is, therefore, timely filed in accordance with the rules of this Court.

UNITED STATES CONSTITUTIONAL
PROVISION INVOLVED

The present case involves right to trial by jury as guaranteed by the Seventh Amendment and its applicability to the states through the Fourteenth Amendment.

STATEMENT OF THE CASE

The parties were involved in litigation in two Arkansas courts. The respondents had sued to collect on a promissory note executed by petitioners and to foreclose on a mortgage to farm land securing the note. This action was pending in a chancery court with equity jurisdiction. Petitioners had sued in circuit court, a court of law jurisdiction, to recover damages based on tortuous conduct by respondents.

Petitioners requested a jury trial in both actions and requested the cases be consolidated for trial in circuit court. Respondents requested the cases be consolidated in chancery court and argued petitioners were not entitled to trial by jury.

The trial judge was the judge for both the chancery court and the circuit court cases. The judge determined the matters should be consolidated in chancery court and tried without a jury.

Respondents were successful in their collection suit and foreclosure action against petitioners. Petitioners' tort action against respondents was dismissed by the trial court. On appeal to the Arkansas Supreme Court, the trial court's actions were affirmed.

REASONS FOR GRANTING THE WRIT

The Seventh Amendment to the United States Constitution states: "In suits at common law, when the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved." It is petitioners' contention that the right to trial by jury in civil actions is incorporated in the Due Process Clause of the Fourteenth Amendment.

In *Minneapolis and St. Louis R.R., Co. v. Bombolis*, 241 U.S. 211 (1916), this Court was faced with the issue of whether the Seventh Amendment applied to state actions; following the well-settled rule that the "first ten Amendments . . . are not concerned with state action", the Court held that state litigants do not have a right to a jury trial in civil actions under the Seventh Amendment. *Id.* at 217. This Court did not address the issue of whether a person has a right to a jury trial in state civil actions under the Fourteenth Amendment.

Later the same year, the Court had an opportunity to tackle the same Due Process question it had avoided earlier. *Hawkins v. Bleakly*, 243 U.S. 210 (1916). Once again the Court refused to consider the matter. Relying on *Walker v. Sauvinet*, 92 U.S. 90 (1896), the Court stated it was settled that the right to a jury trial is not embraced in the Fourteenth Amendment.

In *Walker*, *supra*, the Court made the following argument:

" . . . The States, so far as this amendment is concerned are left to regulate trials in their own courts in their own way. A trial by jury in suit at common law pending in the State courts is not, therefore, a privilege or immunity of natural citizens, which the States are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law, but this does not necessarily imply

that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings (cites omitted). Due process of law is process due according to the law of the land. This process in States is regulated by the law of the States. Our power over that law is only to determine whether it is in conflict with the supreme law of the land. . . .

This reasoning assumes that due process is defined by the law of the States. The result is that no state law could be in violation of the Due Process Clause.

Under the selective incorporation doctrine, the proper test to determine if the Seventh Amendment is applicable to the States through the Fourteenth Amendment is whether the guarantee is "fundamental to the American scheme of justice." *Donlon v. Louisiana*, 391 U.S. 145, 148 (1968). Plainly stated, the question is whether jury trials in civil actions are fundamental.

In *Jacob v. New York*, 315 U.S. 752 (1942) this Court stated:

"The right of jury trials in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment."

Id. at 752-3. Accord. *Similar v. Conner*, 372 U.S. 221 (1963); *Byrd v. Blue Ridge Rural Electric Cooperative, Inc. v. Shore*, 439 U.S. 322 (1979). Clearly the right to trial by jury does not lose its status as a fundamental right simply because the movant is a party in a state proceeding rather than a federal proceeding.

Even applying the standard set forth in *Walker*, *supra*, the petitioners' right to due process has been violated by the chancellor's refusal to grant a jury trial. Under *Walker*

due process is established by the laws of the state. In Arkansas, the right to a jury trial is guaranteed by the State Constitution and the Arkansas Rules of Civil Procedure.

Article 2, Section 7 of the Arkansas Constitution provides: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law, without regard to the amount in controversy." Rule 38(a) of the Arkansas Rules of Civil Procedure provides: "Any party may demand a trial by jury of any issue triable of right by a jury."

Petitioners' demanded a jury trial in both the debt and foreclosure action, as well as the tort action. The Chancellor consolidated the cases in chancery court and deemed they be tried without a jury. The Chancellor's reasoning was based on the Arkansas "clean-up doctrine". *Bierbaum v. City of Hamburg*, 262 Ark. 532, 559 S.W.2d 20 (1977). The "clean-up doctrine" means that once a chancery court obtains jurisdiction of a matter it can decide all issues in the case, both legal and equitable, without a jury. The doctrine is justified by the fact that it helps eliminate docket congestion and piecemeal litigation. Petitioners do not dispute the purposes to be served by a clean-up doctrine. Petitioners respectfully submit, however, that those purposes do not outweigh the fundamental right to trial by jury established by the United States and Arkansas Constitutions.

This Court's decision in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959), mirrors the issue at hand. In *Beacon*, the Supreme Court held that in a case where both legal and equitable issues are present a defendant is entitled to a jury trial on the legal issues. The Court stated that in such a case,

[O]nly under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules (essentially the same of those of

Arkansas) we cannot now anticipate, can the right to a jury trial of legal issues be lost by prior determination of equitable claims.

Id. at 500. This holding, of course, applies regardless of whether the trial judge chooses to characterize the legal issues as "incidental" to the equitable issues or not.

Respect for the power of the States to enact their own rules and procedures governing the right to trial by jury can lead to injustice, such as that which occurred in this case. The Due Process Clause of the Fourteenth Amendment was designed to curtail such injustice and denial of due process. The trial court in this matter was able to effectively deny petitioners their fundamental right to trial by jury guaranteed by the Arkansas and the United States Constitutions by procedural maneuvering in the equity court. The vast majority of the states in this country have statutes or Constitutional Amendments guaranteeing the right to trial by jury. As is seen in this case, these fundamental jury trial rights can be effectively denied and thus a party denied due process by procedural technicalities. This Court can correct any such injustices by making the Seventh Amendment applicable to the states through the Fourteenth Amendment and thus declaring that trial by jury is a fundamental right and denial of same is a denial of due process.

CONCLUSION

The question presented herein falls squarely within the considerations governing review as set out in Rule 17 of the Rules of the United States Supreme Court. Reconsideration of the question of the applicability of the Seventh Amendment to the States through the Fourteenth Amendment could unify the minority of the states which do not allow trial by jury as a matter of right and would result in fundamental fairness in the administration of due process uniformly throughout the states.

CERTIFICATE OF SERVICE

I, Paul Johnson, hereby certify that a copy of the foregoing Petition has been served upon the respondent herein by placing a copy of same in the U.S. Mail, postage paid, addressed to Steve Howard, Attorney at Law, P.O. Box 8, Newport, AR 72112, this 19th day of March, 1987.

/s/ Paul Johnson

APPENDIX "A"

ARKANSAS SUPREME COURT

Jackie Don Colclasure; June	No. 85-241
Colclasure; Thelma Norine	Opinion Delivered
Colclasure; Thelma Norine	December 22, 1986
Colclasure, Guardian of the	
Estate of Ralph E. Colclasure;	Appeal from Lonoke
and Jackie Don Colclasure, Trustee,	Chancery Court
Appellants	
V.	Honorable Russell
	Rogers
Kansas City Life Insurance	Affirmed
Company and J. Marshall	
Chatfield, Successor Trustee,	
Appellees	

ROBERT H. DUDLEY, Associate Justice

The appellee, Kansas City Life Insurance Company, loaned \$450,000.00 to appellants. The installment promissory note evidencing the debt was secured by a mortgage on appellants' farm. When appellants defaulted on an annual installment payment, appellee accelerated the maturity date, made demand, and filed suit for foreclosure in chancery court. The appellants answered and, in addition, filed a complaint in circuit court alleging that the appellee had indicated that a prospective buyer of the farm would be allowed to assume the debt, but then would not permit the assumption. Appellants filed motions to transfer the foreclosure suit to circuit court, to consolidate the cases, and to demand a jury trial. Appellee moved to dismiss the suit in circuit court, or alternatively, to transfer and consolidate in chancery court. The trial court consolidated the cases in chancery court, with the circuit court complaint being treated as a counterclaim, and denied the demand for a jury trial. the day before the chancery case was set for

trial, the appellants filed a motion for default judgment. Service of the motion was had on appellees' attorney the day of trial. The trial court denied the motion for default judgment, granted judgment for the debt, and, if not paid within 20 days, ordered the security sold at public auction. We affirm.

The appellants' first point of appeal is that this is a suit on a debt and the chancellor erred in denying them a jury trial. They contend that there is a distinction between a decree for a money judgment and a decree of foreclosure, and since the decree in this case grants a money judgment they were entitled to a jury trial. They cite cases from other jurisdictions which, they contend, entitle them to a jury trial. *See, e.g., Cheatham v. Bynum*, 568 P.2d 649 (Okla. App. 1977) and *Suburbia Pools, Inc. v. Fischer*, 661 S.W.2d 823 (Mo. App. 1983).

In the cases cited by appellants there is a statute or rule of civil procedure which alters the common law and grants a right of jury trial when a money judgment is sought in a mortgage foreclosure proceeding. We do not have such a statute or rule but, instead, continue to follow the common law that a mortgage foreclosure proceeding is an equitable proceeding.

Appellants next contend that Article 2, Section 7 of the Constitution of Arkansas and the Arkansas Rules of Civil Procedure guarantee them the right to a trial by jury. The argument is without merit. The constitutional right to a jury trial is limited to those cases which were so triable at common law. *Jones v. Reel*, 267 Ark. 237, 590 S.W.2d 6 (1979). A defendant in a mortgage foreclosure proceeding did not have a right to a jury trial at common law. The Rules of Civil Procedure simply set out the procedure by which a party may demand a jury when he has a right to one. ARCP Rule 38.

Foreclosure proceedings are equitable proceedings even though the chancellor may render an in personam

judgment in addition to granting foreclosure. *Price v. State Bank*, 14 Ark. 50 (1853). This is in line with our continued application of the clean-up doctrine, which allows the equity court, once it has properly acquired jurisdiction, to decide law issues incidental to or essential to the determination of the equitable issues. *Towell v. Shepherd*, 286 Ark. 143, 689 S.W.2d 564 (1985). Appellants do not question that the law issue was incidental to the equitable issue in this case.

Appellants next argue that the clean-up doctrine violates Article 2, Section 7 of the Constitution of Arkansas. The argument is without merit. Our current constitution was ratified in 1874, and by that time, our common law was replete with decisions upholding the clean-up doctrine. *Dugan v. Cureton*, 1 Ark. 31 (1837); *Price v. State Bank*, 14 Ark. 50 (1853); *Saunders v. Wood*, 15 Ark. 24 (1854). The constitution was obviously drafted with full knowledge of the clean-up doctrine, and the two are fully compatible.

The appellants next contend that the Seventh Amendment to the Constitution of the United States and *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959), prevent the application of the clean-up doctrine. This argument also is without merit. The Seventh Amendment to the Constitution of the United States, like Article 2, Section 7 of the Constitution of Arkansas, only insures the right jury trial in those cases so triable at common law. The federal courts have long recognized that the Seventh Amendment does not apply in equity cases. *Brennan v. J.C. Penney Co., Inc.*, 61 F.R.D. 66 (D.C. Ohio, 1973) and *Curtis v. Loether*, 415 U.S. 189 (1974). Even if it were held to apply to equity cases where the clean-up doctrine is invoked, the Seventh Amendment would not afford appellants the relief they seek since the Supreme Court of the United States has long recognized that the Seventh Amendment has not been, and should not be, extended to the States through the Fourteenth Amendment. *Hawkins v. Bleakly*, 243 U.S. 210 (1917).

Finally, appellants contend that the trial court committed error in denying their motion for a default judgment. The Chancellor was correct. The appellees had appeared in the action when the motion for a default judgment was filed. Yet, the appellee was not served with notice of the motion until the day of the application for default judgment. At least three days notice was required, ARCP Rule 55(b), so the application was not timely.

Affirmed.

IN THE CHANCERY COURT
OF LONOKE COUNTY, ARKANSAS

KANSAS CITY LIFE INSURANCE
COMPANY AND H. MARSHALL CHATFIELD,
SUCCESSOR TRUSTEE PLAINTIFFS

VS. NO. E-84-318

JACKIE DON COLCLASURE; JUNE COLCLASURE;
THELMA NORINE COLCLASURE; THELMA NORINE
COLCLASURE, GUARDIAN OF THE ESTATE OF
RALPH E. COLCLASURE; UNITED STATES OF
AMERICA - FARMERS HOME ADMINISTRATION;
W.L. SUDDERTH; DAKOTA RESOURCES, INC.;
WESLEY W. LILLEY; MICHAEL H. NORTH;
FIRST STATE BANK OF LONOKE, ARKANSAS;
AND JACKIE DON COLCLASURE,
TRUSTEE DEFENDANTS

DECREE

On this the 17th day of October, 1985, the date previously scheduled for the trial of this cause, this cause is presented to the Court for trial on the pleadings filed herein subject to previous Orders of this Court, all parties herein having been previously notified of the date, time and place scheduled for the trial of this cause, all parties present having announced that they were ready for trial, a trial was held before the Court; and from the pleadings filed herein, the testimony of witnesses, arguments of counsel, and other matters, thing and proof before the Court, the Court doth find that:

1. This Court has jurisdiction of this cause and all parties thereto, all parties having previously entered their appearance herein.

2. Kansas City Life Insurance Company is a business corporation duly organized and existing under the laws of

the State of Missouri, with its principal office and place of business located in Kansas City, Missouri, and is duly authorized and qualified to do business in the State of Arkansas; and H. Marshall Chatfield is an individual residing in Kansas City, Missouri, and is the successor trustee under the Deed of Trust hereinafter mentioned.

3. All of the Defendants named herein have been duly served with summons in the manner and for the time prescribed by law, have entered appearances herein and are subject to the jurisdiction of this Court.

4. The real estate ("REAL ESTATE") and the personal property ("PERSONAL PROPERTY") hereinafter described, and which are the subject of this foreclosure action, are situated in Lonoke County, Arkansas.

5. On August 18, 1977, and for the value received, Jackie Don Colclasure, June Colclasure, Thelma Norine Colclasure, and Thelma Norine Colclasure, as Guardian of the Estate of Ralph E. Colclasure (hereinafter collectively called "Colclasures") executed and delivered to Kansas City Life Insurance Company (hereinafter called "KCL") a Promissory Note (hereinafter called the "Note") in the principal sum of \$450,000.00, bearing interest at the rate of $9\frac{1}{2}\%$ per annum, and being payable as follows: Principal and interest due in annual installments of \$51,066.00 each on the 1st day of April, 1978, and on April 1 of each year thereafter until the principal and interest are fully paid, except that the final payment of principal and interest, if not sooner paid, shall be due and payable on April 1, 1997, including interest from date on the unpaid principal at the rate of $9\frac{1}{2}\%$ per annum, payable annually on April 1 each year in lawful money of the United States of America, with exchange on Kansas City, Missouri. A copy of the Note is attached to Plaintiff's Complaint as Exhibit "A" and is made part thereof by reference.

6. Contemporaneously with the execution of the Note, and to secure payment thereof, Colclasures executed

and delivered to KCL a Deed of Trust ("Deed of Trust"), dated August 18, 1977, conveying and encumbering to and in favor of KCL the Real Estate lying and being situate in Lonoke County, Arkansas, and being more particularly described as follows, to-wit:

The Southwest Quarter of Section Fifteen (15); the Southeast Quarter of Section Sixteen (16); the North Half and the Southwest Quarter and the West Half of the Southeast Quarter and the West Half of the East Half of the Southeast Quarter of Section Twenty-One (21); the Northwest Quarter and the West Half of the Southwest Quarter of the Northeast Quarter and the West Half of the East Half of the Southwest Quarter of the Northeast Quarter of Section Twenty-Two (22), all in Township Three (3) North, Range Eight (8) West, Lonoke County, Arkansas.

Subject to and together with all rights in reservations, easements and exceptions of record, or as used, in relation to all, or any part, of the property hereby conveyed.

7. The Deed of Trust further conveyed to KCL a security interest in the Personal Property which is described as follows:

All irrigation systems, pumping plants, motors, all decreed or appropriated water rights, ditch company stocks, equipment and appurtenances now or hereafter placed on said premises (the Real Estate) or used connection with irrigating said land, including but not by way of limitation, the following:

Three - size 8 - Western pumps, serial #B 68613, #B 74619 and #B 69296

One - size 10 - Stapleton pump, serial #3907

Two - 50 horsepower - U.S. Electric motors, serial #R2030676 & #R2074333

One - 60 horsepower - Newman motor, serial #V1146104

8. The Deed of Trust was, on August 18, 1977, at 11:30 a.m., duly recorded in the office of the Lonoke County Recorder in Mortgage Record Book 204 at Page 304. A copy of the Deed of Trust is attached to Plaintiffs' Complaint as Exhibit "B" and is made a part thereof by reference.

9. To further evidence the lien of KCL on the Personal Property, Colclasures and KCL executed and filed in the office of the Circuit Clerk and Ex-Officio Recorder in and for Lonoke County, Arkansas, under file number 35775, on August 31, 1977, and in the office of the Secretary of State of the State of Arkansas, under file number 0237015, on August 31, 1977, UCC-1 Financing Statements (collectively "UCC-1"), copies of which are attached to Plaintiffs' Complaint as Exhibits "C" and "D", respectively, and are made a part thereof by reference. The UCC-1 has been continued and renewed by KCL and is currently effective to August 31, 1987.

10. Colclasures have defaulted in the payment of the Note in that Colclasures, after demand having been made by KCL, have failed and refused to pay the annual installment due on April 1, 1984; and by virtue of such default, on June 22, 1984, KCL exercised its option under the Note to accelerate the maturity of the Note; and there is now due and owing to KCL by Colclasures the total sum of \$490,590.16, including both principal and interest, as of October 17, 1985, plus interest after October 17, 1985, at the rate of \$116.57 per day, together with its costs and attorney's fees as hereinafter provided.

11. The Note provides that if it is placed in the hands of an attorney for collection, or to collect or establish by proceedings in any court, then a reasonable sum computed upon the amount then due thereon shall be paid as an attorney's fee for the attorney for KCL; and such attorney's fees and out-of-pocket expenses of KCL and its attorney should be awarded herein.

12. KCL is entitled to judgment against Colclasures in the amount of \$490,590.16 as of October 17, 1985, plus interest

thereafter at the daily rate of \$116.57 until paid, plus attorney's fees, court costs and expenses hereinafter set forth.

13. KCL is the current owner and holder of the Note, Deed of Trust and UCC-1; and the Deed of Trust constitutes a first, prior and paramount lien to and in favor of KCL on the Real Estate and Personal Property, superior to the liens, claims and interests of all Defendants herein.

14. United States of America - Farmers Home Administration (hereinafter called "FHA") has a second lien on the Real Estate under and by virtue of a Mortgage dated and filed for record on July 7, 1981, and recorded in Mortgage Record Book 252 at Page 506 of the records of Lonoke County, Arkansas, which said Mortgage is subject and inferior to the Deed of Trust of KCL, and which said Mortgage secures an indebtedness of \$417,475.71, including both principal and interest, as of October 17, 1985, plus interest thereafter at the daily rate of \$91.4886 until paid.

15. The liens of KCL and FHA on the Real Estate are superior and paramount to the rights and interest of W.L. Sudderth, Dakota Resources, Inc., Wesley W. Lilley and Michael H. North under and by virtue of two certain Oil and Gas Leases, both dated August 12, 1981, and filed for record on October 2, 1981, and recorded in Miscellaneous Book 43 at Page 232 and Miscellaneous Book 43 at Page 235 of the records of Lonoke County, Arkansas, and the subsequent Assignments thereof.

16. First State Bank of Lonoke, Arkansas (hereinafter called the "Bank"), has a third lien on the Real Estate under and by virtue of a Mortgage filed for record on June 30, 1983, and recorded in Mortgage Record Book 251 at Page 455 of the records of Lonoke County, Arkansas, which Mortgage secures an indebtedness in the amount of \$310,507.71, including both principal and interest, as of October 17, 1985, plus interest thereafter at the daily rate of \$82.69 until paid. The lien of the Bank is inferior and subordinate to the liens of KCL and FHA, but is superior to the rights of all other parties to this litigation.

17. Colclasures have waived to KCL, FHA and the Bank all rights of appraisement, sale and redemption, dower, curtesy and homestead in and to the Real Estate.

18. KCL should be awarded the attorney's fees for its attorney in the amount hereinafter set forth, plus reimbursement of out-of-pocket expenses of KCL in the amount of \$181.59 and out-of-pocket expenses of its attorneys the amount of \$437.47.

IT IS THEREFORE, BY THE COURT CONSIDERED, ORDERED AND DECREED that Kansas City Life Insurance Company have judgment against Jackie Don Colclasure, June Colclasure, Thelma Norine Colclasure and Thelma Norine Colclasure as Guardian of the Estate of Ralph E. Colclasure, jointly and severally, in the amount of \$490,590.16 as principal and interest to October 17, 1985, interest thereafter at the daily rate of \$116.57 until paid, \$181.59 as reimbursement for the out-of-pocket expenses of Kansas City Life Insurance Company, \$437.47 as reimbursement for the out-of-pocket expense of its attorneys, and the sum of \$11,000.00 as a fee for its attorneys.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that Kansas City Life Insurance Company has a first, prior and paramount lien on the following described Real Estate lying and being situate in Lonoke County, Arkansas, to-wit:

The Southwest Quarter of Section Fifteen (15); the Southeast Quarter of Section Sixteen (16); the North Half and the Southwest Quarter and the West Half of the Southeast Quarter and the West Half of the East Half of the Southeast Quarter of Section Twenty-One (21); the Northwest Quarter and the West Half of the Southwest Quarter of the Northeast Quarter and the West Half of the East Half of the Southwest Quarter of the Northeast Quarter of Section Twenty-Two (22), all

in Township Three (3) North, Range Eight (8) West,
Lonoke County, Arkansas.

Subject to and together with all rights in reservations,
easements and exceptions of record, or as used, in
relation to all, or any part, of the property hereby
conveyed.

IT IS FURTHER CONSIDERED, ORDERED AND
DECREED that Kansas City Life Insurance Company has
the first, prior and paramount lien on the following
described Personal Property in Lonoke County, Arkansas:
to-wit:

All irrigation systems, pumping plants, motors, all
decreed or appropriated water rights, ditch company
stocks, equipment and appurtenances now or hereafter
placed on said premises (the Real Estate) or used
connection with irrigating said land, including but not
by way of limitation, the following:

Three - size 8 - Western pumps, serial #B 68613, #B
74619 and #B 69296

One - size 10 - Stapleton pump, serial #3907

Two - 50 horsepower - U.S. Electric motors, serial
#R2030676 & #R2074333

One - 60 horsepower - Newman motor, serial #V1146104

IT IS FURTHER CONSIDERED, ORDERED AND
DECREED that United States of America - Farmers Home
Administration has a second lien on the Real Estate
hereinabove described to secure a past due indebtedness in the
amount of \$417,475.71, as principal and interest to October 17,
1985, plus interest thereafter at the daily rate of \$91.4886 until
paid.

IT IS FURTHER CONSIDERED, ORDERED AND
DECREED that the First State Bank of Lonoke, Arkansas, has
a third lien on said Real Estate herein above described to

secure the payment of an indebtedness in the amount of \$310,507.71 as principal and interest to October 17, 1985, plus interest thereafter at the daily rate of \$82.69 until paid.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that if this judgment in favor of Kansas City Life Insurance Company, together with all cost adjudged to be paid by Colclasures, be not paid within a period of twenty (20) days from the date of entry hereof, the Commissioner of this Court hereinafter named shall, after advertising the date, time, terms and place of sale for a period of twenty (20) days in a newspaper published in Lonoke County, Arkansas, and having a bona fide circulation therein, by at least two (2) insertions, sell at the Front Entrance the Lonoke County Courthouse in the City of Lonoke, Lonoke County, Arkansas, at public auction to highest and best bidder for cash, or upon credit of three (3) months with approved surety, the above described Real Estate and Personal Property; that the proceeds of such sale shall be applied first to the payment of the costs of this action, including the attorney's fees for the attorneys for Kansas City Life Insurance Company and out-of-pocket expenses incurred by Kansas City Life Insurance Company and its attorneys; that the proceeds of such sale ~~shall be~~ applied second to the payment of the judgment herein rendered in favor of Kansas City Life Insurance Company upon its first, prior and paramount lien; that the proceeds of the sale of said real estate shall be applied third to the payment of the indebtedness owed to United States of America - Farmers Home Administration upon its second lien; that the proceeds of the sale of said Real Estate shall be applied fourth to the payment of the indebtedness owed by Jackie Don Colclasure and June Colclasure to the First State Bank of Lonoke, Arkansas, upon its third lien; and that the remaining proceeds, if any of the sale of said Real Estate and Personal Property shall be retained by the Commissioner of this Court subject to further Orders of this Court. If the proceeds of such sale shall be insufficient to satisfy the judgment of Kansas City Life Insurance Company against Colclasures, Kansas City Life Insurance Company shall have judgment over against Colclasures, to be enforced by writs of garnishment, writs of execution or such other remedies as may

be available upon a judgment at law. The purchaser at such sale shall have a right to immediate possession of said Real Estate and Personal Property from the date of said sale and shall be entitled to a writ of assistance from this Court to obtain immediate possession of the same; and said Real Estate and Personal Property, when so sold, shall be sold free of the liens, claims and interest of all parties herein.

The purchaser at such sale will be required to pay cash or to execute a bond with approved surety to secure the payment of the purchase money, and a lien shall be retained upon said Real Estate and Personal Property as additional security for the payment of said purchase money plus interest thereon at the rate of 10% per annum from the date of such sale until paid.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that if Kansas City Life Insurance Company shall become the purchaser at such sale for a sum equal to or less than the amount of its judgment herein, plus costs and attorney's fees, in lieu of giving the bond as required herein, it may, upon confirmation of such sale, credit upon this Decree the amount of its bid, less the costs to be paid by Colclasures and the fee allowed the Commissioner for executing this Decree, which shall be an extinguishment of the amount herein adjudged to be due to Kansas City Life Insurance Company to the extent of such credit; and if its bid shall exceed the amount herein adjudged to be due with interest, Court costs and attorney's fees, it shall be required to execute bond only for the excess.

Upon the sale of said Real Estate and Personal Property, as aforesaid, and the confirmation of such sale by the Court, all of the right, title and equity of redemption of each, all and every of the Defendants, or any of them, in said Real Estate and Personal Property shall be foreclosed and forever barred, except for the rights of the United States of America - Farmers Home Administration as set forth in 28 U.S.C. §2410.

Colclasures shall pay all of the costs of this action.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that Mary Jane Hallum, Clerk of the Chancery Court of Lonoke County, Arkansas, be and she is hereby appointed Commissioner of this Court to execute this Decree and is directed to make the sale as herein provided for and to report her actions hereunder to this Court.

This Court specifically retains jurisdiction and control of this cause further Orders as may be necessary and proper to enforce the rights of the parties hereto and the rights of such others as may become parties to this cause by proper proceedings or by purchase of said Real Estate or Personal Property at the Commissioner's Sale.

IT IS FURTHER CONSIDERED, ORDERED AND DECREED that the counterclaim and all other claims herein of Colclasures (or any or either of them) against Kansas City Life Insurance Company be and the same are hereby denied.

/s/ Russell Rogers

CHANCELLOR

1/27/86

DATE



No. 86-1566

2

Supreme Court, U.S.

E I L E D

MAY 6 1987

JOSEPH F. SPANIOLO, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1986

JACKIE DON COLCLASURE; JUNE COLCLASURE;
THELMA NORINE COLCLASURE; THELMA NOR-
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OF RALPH E. COLCLASURE; AND JACKIE DON
COLCLASURE, TRUSTEE,

Petitioners,

v.

KANSAS CITY LIFE INSURANCE COMPANY AND
H. MARSHALL CHATFIELD, SUCCESSOR
TRUSTEE,

Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT**

THAXTON, HOUT, HOWARD & NICHOLSON
Attorneys at Law
600 Third Street
P. O. Box 8
Newport, Arkansas 72112
(501) 523-3677

BY: STEVEN G. HOWARD*

*Counsel of Record

10992



QUESTION PRESENTED FOR REVIEW

SHOULD THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BE APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND FURTHER CONSTRUED TO APPLY TO EQUITABLE PROCEEDINGS.

LIST OF PARTIES

The parties in the Supreme Court of Arkansas were as shown herein.

The Respondent, Kansas City Life Insurance Company, is the parent corporation, owning 98.8%, of Sunset Life Insurance Company of America. All other subsidiaries of Kansas City Life Insurance Company are wholly owned.

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**UNITED STATES CONSTITUTIONAL
PROVISIONS INVOLVED**

The Seventh Amendment to the United States Constitution provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the

United States, than according to the rules of common law."

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, "... ; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . . "

STATEMENT OF THE CASE

In the Statement of the Case of Petitioners, the lower court judge's reasoning is omitted. The circuit court complaint of Petitioners was transferred to chancery court in that all allegations of said complaint amounted to no more than equitable defenses to the mortgage foreclosure proceeding brought by Respondents.

SUMMARY OF ARGUMENT

The Seventh Amendment to the United States Constitution mandates jury trials only in cases at law and not equity cases; foreclosure of a mortgage is equitable in nature. Due process of law does not mandate jury trial of equitable issues. The limited right to a civil jury trial pursuant to the Seventh Amendment should not be extended to the state via the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

Petitioners recognize that the Seventh Amendment to the United States Constitution is not applicable to state action; that it is not controlling as to when and if trial by jury in civil cases is available in state courts. Such a conclusion is inescapable if a system of federalism is to exist in this country. Chief Justice White, writing for a unanimous court stated in *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916):

So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal courts, and by state Constitutions and state enactments and proceedings in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning.

Petitioners next concede that the right to a civil jury trial is not encompassed in that bundle of rights secured by the Fourteenth Amendment to the United States Constitution. *Hawkins v. Bleakly*, 243 U.S. 210 (1917). To argue otherwise would require this Court to conclude that Due Process of Law can be afforded *only* by a jury.

Petitioners' argument that a civil jury trial is a fundamental right is even contradicted by the express language of the Seventh Amendment. That amendment clearly applies only to actions at law and actions in which the value in controversy exceed twenty dollars. If this court

is to assume that a civil jury trial is a "fundamental right" applicable to the states by the Due Process Clause, what justification can exist for denying a jury trial to a divorce litigant or a small claims litigant when less than twenty dollars is in controversy? Such litigants are entitled to due process of law but are clearly not entitled to a jury trial even if this Court were to extend the Seventh Amendment to the states by the Fourteenth Amendment. The answer is obvious: A trial by jury in a civil case is not so "fundamental" as to become a part of "due process of law" necessitating incorporation of the Seventh Amendment into the Fourteenth Amendment.

Further, Petitioners argue that the Arkansas Constitution mandates a jury trial in the instant action. The Arkansas Supreme Court, the final arbiter of Arkansas constitutional law, found Petitioners' argument to be "without merit." Petitioners' Appendix "A" at p. A-2.

Even were this Court to apply the Seventh Amendment to the states through the Fourteenth Amendment, it would not afford Petitioners a jury trial in this matter. The issues presented below were clearly equitable and this Court has recognized that no right to a jury trial attaches in such circumstances. *Curtis v. Loether*, 415 U.S. 189 (1974). Petitioners herein ask this Court for a constitutional interpretation that would have no bearing on the instant case. This Court has consistently refused to issue advisory opinions.

The petition brought herein is a discretionary matter with this Court. S.Ct.R. 17.1. Petitioners have shown no conflict between the decision of the Arkansas Supreme Court below and that of any other state court of last resort or federal court of appeals.

CONCLUSION

Respondents request that this Court deny the Petition for Writ of Certiorari filed herein.

Respectfully submitted,

THAXTON, HOUT, HOWARD & NICHOLSON
Attorneys at Law
600 Third Street
P. O. Box 8
Newport, Arkansas 72112
(501) 523-3677

BY: STEVEN G. HOWARD*

*Counsel of Record